Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
LightSquared Subsidiary LLC	)	Report No. SAT-00738
	)	SAT-MOD-20101118-00239
Application for Modification of S2358	)	

PETITION TO DENY

December 2, 2010

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wcainternational
WIRELESS COMMUNICATIONS ASSOCIATION

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Pursuant to Section 309(d)(1) of the Communications Act,[1], and Section 25-154 of the Commission's rules,[2] the Wireless Communications Association International, Inc. ("WCAI"), the trade association of the wireless broadband industry, [3]submits this Petition to Deny the above-referenced application filed by LightSquared Subsidiary LLC ("LightSquared").[4]

I. EXECUTIVE SUMMARY

The 14-day deadline in this proceeding for the filing of initial comments and petitions to deny is both contrary to law and too short to provide the public with an adequate opportunity to comment on the complex issues at stake. To remedy this procedural defect, the Commission should issue a supplemental public notice extending the comment deadline in this proceeding from December 2, 2010 until December 20, 2010.

It is especially surprising that the Commission is attempting to fast-track this application proceeding that raises a significant question of general applicability – whether LightSquared would be in compliance with its obligations as a mobile satellite service provider if its wholesale customers are allowed to offer purely terrestrial service to their end users. The answer to this question would affect all mobile satellite service providers equally and would set precedent with broad

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[1] 47 U.S.C. § 309(d)(l).

[2] 47 C.F.R. § 25.154.

[3] As the Commission is aware, among WCAI's members are providers of commercial broadband services that will compete directly against Lightsquared and those who provide broadband service using capacity obtained from Lightsquared.

[4] Public Notice, SAT-MOD-20101118-00239, Report No. SAT-00738 (rel. Nov. 19, 2010) ("*Public Notice*").

implications for spectrum law, policy, and the public interest. Precedent dictates that such a significant question of general applicability should be addressed in a rulemaking proceeding – in this case, the Commission's ongoing rulemaking proceeding raising the same question – rather than through the ruse of a mere modification application. Accordingly, the Commission should dismiss LightSquared's application without prejudice, subject to the Commission's ongoing rulemaking proceeding. In addition, the Commission should dismiss LightSquared's procedurally defective waiver request.

II. BACKGROUND

LightSquared[5] holds space station licenses to provide mobile satellite service ("MSS") in the L-Band.[6] LightSquared also holds an authorization to operate ancillary terrestrial component ("ATC") base stations and dual-mode MSS/ATC mobile terminals.[7] On Thursday, November 18, 2010, LightSquared filed an application seeking a modification of its MSS ATC authority based on a novel interpretation of the MSS ATC "gating" requirements in Section 25.149 of the Commission's rules.[8] LightSquared did not seek expedited treatment of its modification request; however, consistent with past Commission practice, LightSquared did ask that its application proceeding be treated as permit but disclose to "facilitate the development of a

[5] LightSquared has previously been known as SkyTerra Subsidiary LLC, and even earlier, Mobile Satellite Ventures Subsidiary LLC.

[6] See, e.g., Public Notice, SAT-MOD-20100405-00064, Report No. SAT-00736 (rel. Nov. 12, 2010) (granting, with conditions, the application of LightSquared to modify its authorization to operate the SkyTerra-1 space station at 101.3º W.L. by extending the deadline for launch and commencement of operations from May 26, 2010, to January 31, 2011).

[7] See Mobile Satellite Ventures Subsidiary LLC, DA 04-3553 (rel. Nov. 8, 2004) ("*MSV Order*").

[8] 47 C.F.R. § 25.149.

complete record."

The day after LightSquared filed its modification application, the FCC issued a "special" *Public Notice* seeking comment on the application.[9] This *Public Notice* specified that comments concerning LightSquared's application were due a mere ten days later (inclusive of two weekends and the Thanksgiving holiday) on November 29, 2010, and that reply comments were due in another seven days on December 6, 2010. It also granted LightSquared's request that this proceeding be deemed a permit but disclose proceeding for purposes of the *ex parte* rules.

On November 24, 2010, CTIA – the Wireless Association ("CTIA") filed a request for a one-week extension of time to file initial comments or petitions to deny (until December 6, 2010) and an additional week to file replies and oppositions (until December 13, 2010) in the proceeding.[10] LightSquared filed an *Opposition* to the extension request the same day.[11] In its *Opposition*, LightSquared argued that the Commission's deadline was appropriate because "the agency was under no obligation to put LightSquared's filing on public notice for comment."[12] LightSquared also argued that additional time was unnecessary because the Commission had previously considered LightSquared's business plan.[13] In an order released on November 26, 2010, the day after Thanksgiving, the Commission issued an order granting in part

[9] See 47 C.F.R. § 25.151(b) (providing that "[s]pecial public notices may also be issued at other times under special circumstances involving non-routine matters where speed is of the essence and efficiency of Commission process will be served thereby").

[10] Request for Extension of Comment and Reply Comment Deadlines, CTIA – The Wireless Association, SAT-MOD-20101118-00239 (filed Nov. 24, 2010).

[11] See Opposition of LightSquared Subsidiary LLC, SAT-MOD-20101118-00239 (filed Nov. 24, 2010) ("*Opposition*").

[12] *Id*. at p. 1.

[13] *Opposition* at pp. 2-3.

CTIA's extension request.[14] The Commission extended the deadline for initial comments and petitions to deny until December 2, 2010 (by an additional 3 days) and the deadline for replies and oppositions until December 9, 2010 (by an additional 3 days).[15]

The procedural issues in this proceeding depend in part on the significance of the modification sought by LightSquared. Although LightSquared characterizes its application as an "update" to its MSS ATC authorization, the application appears to be seeking a new, affirmative finding from the Commission that the most recent change to LightSquared's business plan conforms to the Commission's MSS ATC gating requirements. The Commission's decision to permit implementation of MSS ATC was based on the premise that ATC must be "ancillary" to MSS operation. To ensure that the MSS ATC allocation "remains first and foremost a satellite service,"[16] the Commission established "gating" requirements for MSS ATC authorization and operation to ensure that MSS ATC will augment, rather than supplant, MSS. To satisfy the gating requirements, an MSS ATC licensee must, among other things, "offer an integrated service of MSS and MSS ATC"[17] by affirmatively demonstrating that the "MSS ATC operator will use a dual-mode handset that can communicate with both the MSS network and the MSS ATC component to provide the proposed ATC service" or by providing "[o]ther evidence establishing that the MSS ATC operator will provide

[14] LightSquared Subsidiary LLC, DA 10-2243 (rel. Nov. 26, 2010) ("*Extension Order*").

[15] *Id*.

[16] Globalstar Licensee LLC, FCC 08-254 at ¶ 11, n. 26 (rel. Oct. 31, 2008).

[17] 47 C.F.R. § 25.149(b)(4).

an integrated service offering to the public."[18] The "integrated service" requirement "forbids MSS/ATC operators from offering ATC-only subscriptions."[19]

In its application, LightSquared notes that it will operate its network on a wholesale basis and make capacity on its network available to wholesale customers who serve end users.[20] Although LightSquared intends to make dual-mode handsets available to its wholesale customers, it does not intend to require that its wholesale customers offer dual-mode handsets to their end-user customers. Instead, LightSquared's wholesale customers "will have the ability to offer terrestrial-only plans to their own end users."[21] LightSquared's wholesale customers would thus be able to offer ATC-only subscriptions and use 100% of their network capacity for purely terrestrial service. The question presented by the application is whether LightSquared is offering an "integrated" service despite the fact that its wholesale customers would be able to offer ATC-only subscriptions to up to 100% of their end users.

III. DISCUSSION

This is clearly a significant question that would set precedent with broad implications for spectrum law, policy, and the public interest. The Commission recognized as much when it issued a "special" public notice designating this proceeding as a "non-routine" matter pursuant to Section 25.151(b) of the

[18] 47 C.F.R. § 25.149(b)(4).

[19] Flexibility for Delivery of Communications by Mobile Satellite Service Providers in the 2 GHz Band, the L-Band, and the 1.6/2.4 GHz Bands, FCC 05-30 at ¶ 33 (rel. Feb. 25, 2005).

[20] SAT-MOD-20101118-00239, narrative at p. 3 ("*LightSquared Application*").

[21] *Id*. at page 7.

Commission's rules.[22] Yet, the timeline established by the Commission to consider this question is both contrary to law and inadequate to provide the public with an open and transparent opportunity to comment on the critical issues at stake.

A. The deadline for filing initial comments and petitions to deny in this proceeding does not comply with the Communications Act or the Commission's rules and must be extended to December 20, 2010.

Given the significance of the question presented by LightSquared's application, it is surprising that the Commission has given the public only 14 days to file initial comments and petitions to deny and only 7 more days to file replies and oppositions, especially when those 14 days include the Thanksgiving holiday. This truncated filing deadline is also surprising when LightSquared did not justify or even ask for expedited treatment, and the Commission has not given LightSquared expedited treatment for its previous MSS ATC applications.[23] Given the lack of any request for expedited treatment, the absence of any reason offered in the *Public Notice* or subsequent *Extension Order* for expedited treatment, and the significance of the question at issue, 14 days is an insufficient amount of time to develop a full response to LightSquared's application.

Even if this short deadline were otherwise appropriate, the Commission lacks authority to impose a 14-day filing deadline on comments or petitions to deny a satellite application that has been placed on public notice. Section 309(d) of the

[22] 47 C.F.R. § 25.151(b).

[23] See, e.g., Public Notice, SAT-MOD-20090429-00046, SAT-MOD-20090429-00047, Report No. SAT-00609 (rel. Jun. 5, 2009) (providing 30-days for the filing of initial comments and petitions to deny.)

Communications Act[24] provides 30 days for the filing of a petition to deny an application and expressly proscribes the Commission from specifying a filing period "less than thirty days following the issuance of a public notice by the Commission of the acceptance for filing" of an application. The Commission's rules governing satellite applications also provide for a minimum of 30 days to file a petition to deny. Section 25.154 of the Commission's rules states that "Petitions to deny, petitions for other forms of relief, and other objections or comments must . . . [b]e filed within thirty (30) days after the date of public notice announcing the acceptance for filing of the application or major amendment thereto (unless the Commission otherwise extends the filing deadline)." Although Rule 25.154 allows the Commission to *extend* the filing deadline, it does not allow the filing deadline to be shortened (presumably because Section 309(d) of the Act prohibits shorter deadlines for applications placed on public notice).

LightSquared argues that its MSS ATC application is a "minor modification" application pursuant to Section 25.117(f) of the Commission's rules, and is therefore exempt from public notice and filing deadlines.[25] Rule 25.117(f) provides that "[a]n application for modification of a space station license to add an ancillary terrestrial component to an eligible satellite network will be treated as a request for a minor modification *if* the particulars of operations provided by the applicant comply with the criteria specified in § 25.149."[26] Section 309(c)(2)(A) of the Act provides that the 30-day waiting period in Section 309(b) (and thus, the 30-day filing period for

[24] 47 U.S.C. § 309(d).

[25] *Opposition* at pp. 1-2.

[26] 47 C.F.R. § 25.117(f) (emphasis added).

petitions to deny in Section 309(d)) does not apply "to any application for . . . a minor change in the facilities of an authorized station."[27] Rule 25.151(c)(1) provides that a "public notice will not normally be issued for receipt of . . . applications . . . [f]or authorization of a minor technical change in the facilities of an authorized station."[28] LightSquared thus believes that its application is for a "minor technical change" that is not subject to the minimum 30-day filing requirement in Section 309(d) of the Act and Rule 25.154 or the public notice requirements in Rule 25.151.

Whatever merit LightSquared's argument might have had was foreclosed by the Commission's decision to issue the *Public Notice*. An MSS ATC application is treated as a minor modification only *if* the applicant demonstrates compliance with Rule 25.149. The conditional "if" means that a modification application that fails to make such a demonstration (e.g., presents a material question of fact or novel interpretation of law) *must* be treated as "major."[29] Otherwise, the "only if" language in Rule 25.149 would have no meaning. As noted above, LightSquared's modification application presents a novel interpretation of law, and therefore must be treated as a "major modification" subject to the 30-day pleading deadline in Section 309(d) of the Act and Rule 25.154. Accordingly, the Commission's decision to issue the *Public Notice* was not "voluntary" as LightSquared claims – it was required by the Commission's rules.

Even if the issuance of the *Public Notice* could be considered "voluntary," the Commission's decision to issue the *Public Notice* in and of itself obligates the

[27] 47 U.S.C. § 309(c).

[28] 47 C.F.R. § 25.151(c)(1).

[29] See 47. C.F.R. § 25.117(f).

Commission to give the public 30-days to file comments and petitions to deny. The Commission has the discretion to put even minor modification applications on public notice pursuant to Rule 25.151. By specifying that minor modification applications "will not *normally*" be put on public notice, Rule 25.151(c) allows the Commission latitude to issue a public notice for a modification application in *abnormal* situations. Likewise, Rule 25.151(b) provides the Commission with discretion to issue a "special" public notice for issues it deems non-routine, regardless of the classification (as "major" or "minor") of the application raising the matter. Once the Commission issues a public notice, even for an otherwise minor modification application, the Commission no longer has the discretion to specify an initial filing deadline that is less than thirty days. Rule 25.151(d) provides that, except in the case of temporary fixed earth stations, "*no* application that has appeared on public notice will be granted until the expiration of a period of thirty days following the issuance of the public notice listing the application" and "[a]ny comments or petitions must be delivered to the Commission by that date in accordance with § 25.154."[30] Because LightSquared's application has "appeared on public notice," the public must be given 30-days to file comments or petitions to deny "in accordance with § 25.154."

The lack of discretion regarding filing deadlines imposed by Rule 25.151(d) – even when an application is "voluntarily" put on public notice by the Commission – is consistent with Section 309 of the Communications Act. The Commission's decision to put a nominally "minor" application on public notice constitutes a finding that the application is not "routine" (see Rule 25.151(b)) or "normal" (see Rule 25.151(c)),

[30] 47 C.F.R. § 25.151(d) (emphasis added).

and is thus not properly "minor" within the meaning of Section 309(c) of the Act. And when an application is put on public notice (i.e., is not "minor" within the meaning of Section 309 of the Act), the Act requires that the Commission allow 30-days for public input.

The 14-day deadline for filing comments and petitions to deny LightSquared's application is thus inconsistent with the Commission's legal responsibilities under the Communications Act and the Commission's own rules. To remedy this procedural defect, the Commission should issue a supplemental public notice extending the comment deadline from December 2, 2010 until December 20, 2010, which is 30 days after the *Public Notice* was originally issued.[31] The Commission should also provide an additional ten-day period for oppositions to petitions to deny (until December 30, 2010) and an additional 5-day period for replies (until January 7, 2011),[32] as provided for in Rules 25.154(c) and 25.154(d), respectively.

B. The Commission should dismiss LightSquared's application, which raises an issue of general applicability that should be determined via rulemaking rather than in an *ad hoc* adjudicatory proceeding.

The issue raised by LightSquared in its application – whether an MSS ATC licensee may wholesale its network capacity without requiring that its wholesale customers offer an integrated service to end users – is an issue of general applicability. The answer to this question will affect all MSS ATC licensees that offer or intend to offer wholesale service – not just LightSquared. Because LightSquared's proposal contemplates that all of its network capacity may be used for terrestrial

[31] See 47 C.F.R. § 1.4.

[32] See 47 C.F.R. § 1.4(g) (providing that, if the filing period is less than 7 days, intermediate holidays shall not be counted in determining the filing date).

services only, the issue at stake also implicates the very foundation of the MSS ATC rules, which are premised on MSS ATC remaining primarily a satellite service (and which prohibit ATC-only subscriptions). Given that this is a question of general applicability that implicates spectrum law, policy, and, ultimately, the public interest, it is more appropriately considered in the Commission's ongoing MSS ATC rulemaking than through an *ad hoc* adjudicatory proceeding.[33]

Although routine license proceedings are typically handled as adjudicatory proceedings, Commission and court precedent dictate that applications that raise issues of general applicability should be decided via rulemaking.[34] In the *M2Z Licensing Order*, the Commission found that when an application implicates issues of generally applicability, the "public interest is best served by full consideration" of the issues in a rulemaking proceeding, "rather than attempting to act upon these applications in an *ad hoc* adjudicatory proceeding."[35] Although the *M2Z Licensing Order* involved an application filed pursuant to statutory authority prior to the adoption of service rules for use of the spectrum at issue, LightSquared's order is analogous because the relief it seeks would rewrite the service rules for MSS ATC. As the FCC recognized in the *M2Z Licensing Order*:

> It does not serve the public interest to silence debate on these issues . . . . Rather, giving all interested parties the opportunity to comment on these

[33] See Fixed and Mobile Services in the Mobile Satellite Service Bands at 1525-1559 MHz and 1626.5-1660.5 MHz, 1610-1626.5 MHz and 2483.5-2500 MHz, and 2000-2020 MHz and 2180-2200 MHz, FCC 10-126 (rel. Jul. 15, 2010) ("*MSS NPRM/NOI*").

[34] See, e.g., Applications for License and Authority to Operate in the 2155-2175 MHz Band, FCC 07-167, at ¶ 28 (rel. Aug. 31, 2007) ("*M2Z Licensing Order*") (stating that "[a]lthough the Commission has wide latitude to choose whether it will proceed by adjudication (e.g., waiver proceedings) or by rulemaking, it is nevertheless the case that guidance from the courts indicates that issues of general applicability are more suited to rulemaking than to adjudication").

[35] *Id*.

> types of important issues in a rulemaking proceeding – rather than an *ad hoc* adjudicatory proceeding . . . – is the most effective, fairest and efficient way to arrive at a result that will best serve the public interest.[36]

Indeed, the Commission has already found that the public interest requires that issues of the type LightSquared seeks to address be considered via a rulemaking proceeding. In the *2010 Globalstar MSS ATC Order*, the Commission found that, "to the extent the Commission would consider changes in its rules that might permit more extensive standalone terrestrial operations in this frequency band, this action would be taken following a proceeding in which a full record concerning all potentially available options can be developed."[37] That such issues are better suited for rulemaking is presumably why the Commission initiated a rulemaking this summer to consider "removing barriers to terrestrial use" of MSS spectrum, including in the L-band spectrum licensed to LightSquared.[38] Given that there is an ongoing rulemaking addressing the question LightSquared raises in its application, fast-tracking LightSquared's application through a restricted proceeding does not serve the public interest. To the contrary, it gives the impression that LightSquared is receiving unusually favorable treatment, especially when GlobalStar's similar request was denied in favor of proceeding via rulemaking.

The significance of LightSquared's MSS ATC application is in no way diminished by the approval of its unrelated transfer of control application.[39]

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[36] *Id*. at ¶ 29.

[37] Globalstar Licensee LLC, FCC 10-1740 at ¶ 42 (rel. Sep. 14, 2010) ("*2010 Globalstar MSS ATC Order*").

[38] *MSS NPRM/NOI* at ¶ 1.

[39] See *SkyTerra Communications Inc., Transferor, and Harbinger Capital Partners Funds, Transferee, Applications for Consent to Transfer of Control of SkyTerra Subsidiary LLC*, DA 10-535 (rel. Mar. 26, 2010) ("*Transfer Order*").

LightSquared asserts in its *Opposition* that the ability of its wholesale customers to offer ATC-only subscriptions to end users "merely elaborates" on the "business plan" that it filed in support of the Harbinger-SkyTerra transfer of control proceeding.[40] But the "business plan" submitted in the transfer of control proceeding nowhere indicates that end users would be offered ATC-only subscriptions, nor does the Commission's order approving the transfer of control anywhere address such an issue.[41] Absent an express description of LightSquared's MSS ATC plans, and given that the Commission has expressly prohibited MSS ATC licensees from offering ATC-only subscriptions, participants in the transfer of control proceeding had no notice whatsoever of LightSquared's intentions regarding its MSS ATC authority. In these circumstances, any attempt by LightSquared to imply that this proceeding is merely an extension of the transfer of control proceeding should be rejected.

As the Commission so aptly noted in the *M2Z Licensing Order*, "a potentially speedy but ill-considered licensing process does not serve the public interest."[42] To avoid such an ill-considered result here, the Commission should dismiss LightSquared's application without prejudice, subject to the Commission's ongoing rulemaking proceeding.

C. The Commission should dismiss LightSquared's throwaway waiver request as procedurally defective.

In the conclusion of the narrative portion of its application, LightSquared makes a throwaway request for waiver. This request should be dismissed as

[40] *Opposition* at p. 2.

[41] See, generally, *Transfer Order*.

[42] *M2Z Licensing Order* at ¶ 9.

procedurally defective. Question 35 of Form 312, the main portion of any satellite application, asks whether the applicant requests "any waivers or exemptions from any of the Commission's Rules." On its Form 312 in this proceeding, LightSquared answered "No."[43] LightSquared cannot answer this question in the negative and then imply in the conclusion to its narrative that it is indeed making such a request. In the absence of an amendment to its modification application that answers question 35 in the affirmative, the Commission should not consider LightSquared's procedurally defective waiver request.

Even if LightSquared had properly made a request for waiver, the Commission should not consider its merits. In the order that initially granted MSS ATC authority to LightSquared's predecessor in interest, the Commission refused to consider a waiver request that implicated issues in an ongoing rulemaking proceeding.

> We generally decline . . . to rule on the merits of contested waiver requests that turn on resolution of issues that are also raised before the Commission in the ATC rulemaking proceeding and require a re-balancing of competing interests or deviation from an established Commission policy. Resolution of such issues is best left to the Commission based on the record developed in the rulemaking proceeding.[44]

As noted above, the issues raised by LightSquared in its application are also raised in the Commission's ongoing rulemaking addressing MSS ATC in the L-band.

Accordingly, the Commission should dismiss LightSquared's throwaway waiver request without prejudice.

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[43] *LightSquared Application*, Form 312.

[44] *MSV Order* at ¶ 14.

IV. CONCLUSION

For the above reasons, WCAI respectfully requests that the Commission remedy the numerous procedural defects in this proceeding as requested.

Respectfully submitted,

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By: /s/ Fred Campbell

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December 2, 2010

CERTIFICATE OF SERVICE

I, Jennifer L. Canose, hereby certify that the foregoing Petition to Deny was served this 2nd day of December, 2010, by depositing a true copy thereof with the United States Postal Service, first class postage prepaid, addressed to the following:

Mr. Jeffrey Carlisle
Executive Vice President
Regulatory Affairs & Public Policy
LightSquared
10802 Parkridge Boulevard
Reston, VA 20191

/s/ Jennifer L . Canose
Jennifer L. Canose